

Notice of Emergency Action

The State Board of Equalization Has Adopted California Code of Regulations, Title 18, Section 2000, *Retailer Reimbursement Retention*

NOTICE IS HEREBY GIVEN

Public Resources Code (PRC) section 4629.5, subdivision (a)(1) imposes a one-percent assessment on purchasers of lumber products and engineered wood products on and after January 1, 2013. PRC section 4629.5, subdivision (a)(3) requires retailers to collect the assessment and provides that retailers “may retain an amount [from the assessments they collect] equal to the amount of reimbursement, as determined by the State Board of Equalization [(Board)] pursuant to regulations, for any costs associated with the collection of the assessment” imposed by subdivision (a)(1). The Board, pursuant to the authority vested in it by PRC section 4629.5, subdivision (a)(3) has adopted California Code of Regulations, title 18, section (Regulation) 2000, *Retailer Reimbursement Retention*, as an emergency regulation pursuant to Government Code section 11346.1, to specify the amount of reimbursement a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3).

EMERGENCY

Statement of Emergency

PRC section 4629.5, subdivision (a)(3) expressly provides that “For purposes of this paragraph, the State Board of Equalization may adopt emergency regulations pursuant to Section 11346.1 of the Government Code. The adoption of any regulation pursuant to this paragraph shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health, and safety, and general welfare.”

Section 48 Statement

Government Code section 11346.1, subdivision (a)(2) requires that, at least five working days prior to submission of the emergency regulation to the Office of Administrative Law (OAL), the Board provide a notice of the emergency regulation to every person who has filed a request for notice of regulatory action with the Board. After submission of the emergency regulation to OAL, OAL shall allow interested persons five calendar days to submit comments on the emergency regulation as set forth in Government Code section 11349.6.

AUTHORITY & REFERENCE

PRC section 4629.5

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Existing Law

PRC section 4629.5, as enacted by Assembly Bill No. (AB) 1492 (Stats. 2012, ch. 289), imposes, on and after January 1, 2013, a one-percent assessment on purchasers of lumber products and engineered wood products to be collected by retailers at the time of sale. As enacted by AB 1492, PRC section 4629.5, subdivision (a)(3) authorizes the Board to adopt regulations to determine the amount retailers may retain from the assessments they collect as reimbursement for certain compliance costs. Specifically, PRC section 4629.5, subdivision (a)(3), in relevant part, provides:

The retailer shall collect the assessment from the person [i.e., purchaser] at the time of sale, and may retain an amount equal to the amount of reimbursement, as determined by the State Board of Equalization pursuant to regulations, for any costs associated with the collection of the assessment, to be taken on the first return or next consecutive returns until the entire reimbursement amount is retained.

Notably, the statute provides that retailers may only retain the Board-prescribed amount of reimbursement one time, on the retailers' first return or next consecutive returns filed immediately after the retailers are required to begin collecting the assessment on January 1, 2013. The statute does not authorize retailers to retain additional amounts thereafter.

As to legislative history, both the relevant Senate and Assembly floor analyses refer to retailers being reimbursed for "costs to set up collection systems." (See p. 2 of the September 1, 2012, Assembly Floor Analysis of AB 1492 and p.2 of the August 29, 2012, Senate Floor Analysis of AB 1492.) Thus, both the plain language of PRC section 4629.5, subdivision (a)(3) and the available information regarding legislative intent support an interpretation that subdivision (a)(3) provides for affected retailers to retain a one-time amount, as specifically determined by the Board, for reimbursement of costs to set up collection systems prior to the commencement of their collection duties on January 1, 2013. Therefore, neither the plain language of PRC section 4629.5, subdivision (a)(3) nor the available legislative history persuasively support an interpretation that would allow for the retention of ongoing costs of compliance or of amounts in excess of the Board-specified reimbursement amount.

Regulation 2000

The Board added a new chapter 4.1 to division 2 of title 18 of the California Code of Regulations so that any regulations the Board is required to adopt to implement, interpret, and make specific the assessment imposed by PRC section 4629.5, as enacted by AB 1492, can be codified in the new chapter. The Board also voted to adopt Regulation 2000, *Retailer Reimbursement Retention*, which will be codified in new chapter 4.1, as an emergency regulation, on October 23, 2012, in order to determine the "amount of reimbursement" a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3), when retailers start collecting the assessment on January 1, 2013. Regulation 2000

provides that retailers as of January 1, 2013, may retain collected assessment amounts of up to \$250 per location as reimbursement for one-time, startup costs associated with the collection of the assessment (i.e., the costs to set up collection systems). Specifically, Regulation 2000 provides:

Public Resources Code section 4629.5, as added by Statutes 2012, chapter 289, requires the Board of Equalization to adopt a regulation to determine the amount of reimbursement a retailer may retain for costs associated with the collection of the Lumber Products Assessment imposed by Public Resources Code section 4629.5.

A retailer required to collect the Lumber Products Assessment may retain no more than \$250 per location as reimbursement for startup costs associated with the collection of the assessment. Such reimbursement is to be taken on the retailer's first return on which the Lumber Products Assessment is reported or, if the amount of the collected assessment is less than the allowed reimbursement, on the retailer's next consecutive returns until the allowed reimbursement amount is retained.

"Location" means and is limited to a business location registered under the retailer's seller's permit as of January 1, 2013, where sales of products subject to the assessment are made.

Regulation 2000 is anticipated to provide the following benefits:

- Provide certainty as to the amount of reimbursement retailers may retain pursuant to PRC section 4629.5, subdivision (a)(3) before the assessment is imposed and collected beginning on January 1, 2013, and before retailers are required to file their first returns showing the retention of the Board-specified amount of reimbursement;
- Permit retailers to retain the amount of reimbursement determined by the Board without requiring retailers to keep additional records or substantiate their individual costs; and
- Preserve the public peace, health, safety, and general welfare, as provided in PRC section 4629.5, subdivision (a)(3).

The \$250 reimbursement amount is supported by U.S. Census Bureau data and a 2006 PricewaterhouseCoopers LLP report (*Retail Sales Tax Compliance Costs: A National Estimate, Volume One: Main Report*, PricewaterhouseCoopers LLP, Prepared for Joint Cost of Collection Study, National Economic Consulting, April 7, 2006). The report was commissioned by a public-private partnership known as the Joint Cost of Collection Study and analyzes a large-scale survey that was conducted to develop the first national measure of sales tax compliance costs. The report shows that, in 2003 (a time during which many retailers had compliance costs associated with rate and base changes under the Streamlined Sales and Use Tax Agreement), gross retail sales tax compliance costs for programming and servicing cash registers were reflected by a weighted average cost

of 0.01 percent of taxable sales. (See 2006 PricewaterhouseCoopers LLP report, Table V.B.1b (“Gross Compliance Costs by Type and Size of Annual Retail Sales, 2003 [As a percentage of total taxable sales]”), at p. 13.)

Board staff calculated the \$250 amount by multiplying 0.01 percent by \$2,500,000. The \$2,500,000 figure was chosen after reviewing the United States Census Bureau’s data for the Retail Trade Sector from the *2007 Economic Census*, which showed that about 50 percent of lumber retail establishments in 2007 had sales of \$2,500,000 or less. This data provides an objective foundation for determining that a reimbursement of \$250 per location represents a reasonable estimate of the average startup costs for retail lumber establishments that must start collecting the assessment on January 1, 2013 (i.e., the costs to set up collection systems).

As additional comparison, Board staff looked at the average reimbursement amount retained by retailers under the Covered Electronic Waste Recycling Fee imposed by PRC section 42464 and the California Tire Fee imposed by PRC section 42885, which allow retailers to retain 3 percent and 1.5 percent of the fees they collect, respectively, as reimbursement for collection costs. The average reimbursement amount, meaning the total reimbursement amount retained by all retailers divided by the number of retailers, was \$244 per retailer in fiscal year 2010-2011. While compliance costs for these programs are reimbursed per retailer (not per location) and on an ongoing basis (not a one-time, startup basis), the average reimbursement amount for these programs is generally consistent with, and provides additional support for, the \$250 reimbursement amount for collecting the assessment imposed by PRC section 4629.5.

David Bischel, President of the California Forestry Association (CFA), indicated in his October 19, 2012, letter to the Board that:

- The CFA was a key sponsor of and worked closely with the Legislature and the administration in enacting AB 1492; and
- The CFA supports the adoption of Regulation 2000 because the regulation “reflects the legislative intent regarding retailer compensation,” which “was to allow only a one-time amount to cover initial costs of compliance, which the Legislature had been informed would be no more than \$250 per retail establishment.”

Mr. Bischel also made similar comments on behalf of the CFA and urged the Board to adopt Regulation 2000 during the Board’s discussion of the regulation on October 23, 2012.

The Board has performed an evaluation of whether Regulation 2000 is inconsistent or incompatible with existing state regulations and determined that Regulation 2000 is not inconsistent or incompatible with existing state regulations because it is the only existing state regulation prescribing the “amount of reimbursement” a retailer may retain pursuant to PRC section 4629.5, subdivision (a)(3). In addition, there is no federal assessment

similar to the assessment imposed by PRC section 4629.5 and there are no comparable federal regulations or statutes to Regulation 2000.

DOCUMENTS RELIED UPON AND INTERESTED PARTIES COMMENTS

The Board relied upon a memorandum from its Chief Counsel, Randy Ferris, dated October 12, 2012, the attachment to the memorandum, Mr. Bischel's October 19, 2012, letter, and the comments made by Board staff and interested parties during the discussion of Regulation 2000 on October 23, 2012, including Mr. Bischel's comments expressing the CFA's support for the adoption of Regulation 2000, in voting to adopt Regulation 2000 as an emergency regulation.

In addition, the Board received a September 24, 2012, letter from Bill Dombrowski, President and CEO of the California Retailers Association (CRA), which asked eight questions regarding the collection of the assessment imposed by PRC section 4629.5, that Board staff responded to during the Board's discussion of Regulation 2000 on October 23, 2012.

Further, prior to adopting Regulation 2000, the Board received and considered an October 12, 2012, letter from Ken Dunham, Executive Director of the West Coast Lumber & Building Material Association, in which the association requested that:

- For retailers whose computer systems are capable of implementing the assessment, Regulation 2000 provide an initial "reimbursement of a minimum of \$4,500 per business location" and ongoing reimbursement of "\$1,500 annually to handle updates and changes" to the retailers' computer systems; and
- For those retailers whose current computer systems are not capable of implementing the assessment, Regulation 2000 provide reimbursement at "a level sufficient to recover the cost of replacement computer systems."

The Board received and considered an October 18, 2012, letter from David Carlsen, Vice President Tax for 84 Lumber Company, which explained that the company had conservatively estimated that it would cost \$21,000 to make changes to its POS system to collect the assessment at its California locations. The Board also received and considered an October 21, 2012, letter from Mr. Dombrowski, which indicated that the CRA believes that the \$250 per location reimbursement amount specified by Regulation 2000 is inadequate and that the CRA disagrees with the conclusion that PRC section 4629.5, subdivision (a)(3) only provides for a retailer to retain the specified reimbursement amount "one time."

Furthermore, during the Board's discussion of Regulation 2000 on October 23, 2012:

- Mr. Dunham reiterated the West Coast Lumber & Building Material Association's comments from his October 12, 2012, letter;
- Gerry Charron, Software Development Manager for Stock Building Supply, stated that Regulation 2000 would provide \$2,500 of reimbursement to his

business, but that he estimates that it will cost his business \$50,000 (250 hours at \$200 per hour) to update its computer system to collect the assessment;

- Craig Evans, Vice President of Learned Lumber, stated that it will cost his business \$7,800, plus overtime, to update its computer system to collect the assessment and urged the Board to reconsider the amount of reimbursement specified by Regulation 2000; and
- Mandy Lee, Director of Government Affairs for the CRA, reiterated the CRA's comments from Mr. Dombrowski's October 21, 2012, letter, and requested that the CRA be given a further opportunity to substantiate its members' costs.

Therefore, on October 23, 2012, the Board also unanimously voted to begin a Business Taxes Committee process to meet with the interested parties and discuss the adoption of a regulation to permanently specify the amount of reimbursement a retailer may retain for costs associated with the collection of the assessment imposed by PRC section 4629.5 beginning January 1, 2013.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of Regulation 2000 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of Regulation 2000 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

EFFECTIVE DATE

The assessment imposed by PRC section 4629.5 will be operative on and after January 1, 2013, and retailers will not be able to retain the reimbursement provided by PRC section 4629.5, subdivision (a)(3) and specified by Regulation 2000 until they begin collecting the assessment on January 1, 2013. Therefore, the Board hereby specifies that Regulation 2000 shall be effective on and after January 1, 2013, pursuant to Government Code section 11346.1, subdivision (d).

CONTACT PERSONS

Questions regarding the substance of Regulation 2000 should be directed to Bradley M. Heller, Tax Counsel IV, by telephone at (916) 323-3091, by e-mail at

Bradley.Heller@boe.ca.gov, or by mail at State Board of Equalization, Attn: Bradley M. Heller, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Other inquiries concerning the emergency regulation should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984 , by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.